IN THE

Supreme Court of the United States

October Term, 1974

NO. _____

LIONEL HORACIO BUITRON and
JUAN GUERRA RAMIREZ,
Petitioners

v.

STATE OF TEXAS,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas, entered in the above cause on March 21, 1975.

OPINION BELOW

The opinion of the Court of Criminal Appeals is printed in Appendix A of this petition. It has not yet been reported.

JURISDICTION

The judgment of the Court of Criminal Appeals, printed as Appendix B of this petition, was entered on March 21, 1975, at which time Petitioners' Motion for Leave to File Motion for Rehearing was also denied. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3).

QUESTION PRESENTED

Does the warrantless search of Petitioners' truck deprive Petitioners of their Fourth Amendment to be free from unwarranted searches, when sufficient time and information were present to obtain a search warrant and no exigent circumstances existed to prevent obtaining a search warrant.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is Amendment IV to the Constitution of the United States of America which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

At approximately 11:00 a.m., August 3, 1973, Texas Department of Public Safety officer Hector Sanchez received a telephone call from an informer who told them that he had overheard a conversation in which the taking of marijuana in a pickup truck with a camper shell to Goliad was discussed. The informer related that several individuals were to register at the Goliad Inn in Goliad, Texas, with the marijuana.

Based upon this information, agent Sanchez with other officers traveled to Goliad and set up a surveillance of the Goliad Inn at approximately 12:30 p.m. A red and white pickup truck with a camper shell registered to a man from Robstown, Texas, was observed parked at the motel.

At 3:00 p.m. Sanchez saw Petitioner Ramirez arrive at the Goliad Inn in a white pickup truck. Arturo Mireles, a passenger in the white pickup, went into room 104, then returned to the white pickup and drove North toward Victoria with Ramirez driving. Shortly thereafter, Petitioner Buitron came from room 104 and drove the red and white pickup North toward Victoria.

The two trucks stopped at a point approximately three miles north of Goliad and Petitioner Buitron then continued north to Victoria and Petitioner Ramirez returned to the Goliad Inn. Agent Sanchez requested the Department of Public Safety dispatcher in Victoria to have uniformed officers stop the red and white pickup and search it.

On the edge of the City of Victoria, two uniformed officers of the Texas Department of Public Safety stopped the red and white pickup, with guns drawn took Buitron

and a passenger, Danny Joel Earley, from the truck, placed handcuffs on the two and held them in a ditch beside the truck. Officer Havrda removed the keys to the truck from the ignition switch. At that point it was patently impossible for Buitron or Earley to move the truck, reach a weapon in the truck or destroy any contraband that might be in the truck.

At approximately 3:30 p.m., more than four hours after narcotics agents learned of the marijuana, after restraining Buitron and Earley and immobilizing the red and white pickup truck, D.P.S. officer Havrda conducted a warrantless search of the truck just a short distance from a magistrate in Victoria to whom the Petitioners were shortly taken after their arrest.

Petitioners challenged the validity of the search by Motion to Suppress the Evidence seized as a result of the search in the trial court. A full hearing was had upon the Motion. When the state offered into evidence the illegally seized marijuana at the trial court, the Petitioners strenuously objected to its introduction on the grounds, inter alia, that such evidence was the fruit of an illegal, warrantless search. The Motion to Suppress and objection to the introduction of the evidence was overruled by the Trial Judge.

Upon appeal to the court of Criminal Appeals from the conviction at the trial court level, Petitioners presented as an assignment of error the failure of the trial court to suppress the marijuana which was the fruit of a warrantless search in violation of the guarantees of the Fourth Amendment to the Constitution of the United States. The Court of Criminal Appeals of Texas affirmed the Trial Court.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The question presented here is whether a law enforcement agency, when given sufficient time and information to obtain a search warrant but refuses to do so, in conducting a warrantless search of an automobile after they have immobilized said automobile, and have the occupants in custody and control to the extent that they can not obtain a weapon from the vehicle nor destroy any contraband that might be located therein, infringed upon the Fourth Amendment protection against unreasonable searches and seizures.

While this Court has held that a warrantless search of an automobile is valid where probable cause exists because mobility of the automobile creates exigent circumstances justifying a warrantless search, it is respectfully submitted that such cases did not present the situation in which the law enforcement agency had sufficient time and information to obtain a search warrant but simply refused to do so.

These cases generally present a situation in which the actions of the driver and passengers of an automobile give the law enforcement officers probable cause to search the car, but the officers are unable to obtain a search warrant because to do so would mean losing sight of the suspect car. Thus, probable cause, the mobility of the automobile and the inability of the law enforcement officers to obtain a search warrant without losing contact with the car to be searched combine to justify a warrantless search.

The case at bar simply does not present such a situation. Although probable cause was presented by the in-

formant, the information was presented with sufficient time to obtain a search warrant. Furthermore, the narcotics agents had several cars and enough personnel to maintain surveillance of the pick-up trucks in Goliad while a search warrant was obtained. Thus, neither element comprising "exigent circumstances" (i.e., lack of time and probability of losing contact with the automobile to be searched) were present even prior to stopping the pickup truck.

Once the pickup truck was stopped, and the occupants removed, handcuffed and the keys removed from the ignition by the D.P.S. officer, there certainly existed no exigent circumstances to justify a search of the locked camper on the truck. The pickup could not be removed from the scene. The petitioner Buitron, could not have destroyed such a large quantity of marijuana while handcuffed and under the watchful eyes of two D.P.S. officers nor could he have obtained a weapon from the locked camper. At that point no exigent circumstances existed to justify a warrantless search of the pickup.

In *United States of America v. Garay,* 477 F.2d 1306 (C.A. 5th Cir., 1973), the Fifth Circuit held a warrantless search to be invalid where the law enforcement officers had the defendant under restraint and the baggage to be searched was under the control of the officers. "Thus, the mobility of the bags at the time of seizure does not bring the instant case within the doctrine of *Carroll* [*v. United States,* 267 U.S. 132, 45 S.Ct. 280 1925] because their mobility was at all pertinent times subject to the control of the arresting officers. In short, the officers could have and should have held the bags until they obtained a warrant authorizing an examination of their contents." *U.S. v. Garay,* supra, at 1308.

A decision by this Court resolving this question would have significance far beyond this immediate case because the issue of when a search warrant is necessary in order to search a vehicle when sufficient time and opportunity are given law enforcement authorities to obtain one is of extreme importance in preserving the fundamental rights of American citizens to be free from unreasonable searches. Modern Americans spend much of their lives in an automobile. Now more than ever the American's car is an essential element of his life deserving of protection from unreasonable search.

Resolution of this question favorably to petitioners would require a holding that the marijuana seized as a result of the warrantless search be suppressed. We urge the Court to make such a holding and, on the basis thereof, to reverse the judgment of the Court of Criminal Appeals of Texas and remand the case for a new trial for petitioners.

CONCLUSION

For the reasons given above, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NO. 49,098

LIONEL HORACIO BUITRON and
JUAN GUERRA RAMIREZ, *Appellants*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from GOLIAD County

O P I N I O N

The appellants appeal from conviction for the possession of marihuana; the punishment assessed for each appellant is imprisonment for ten years.[1] The appellants urge that evidence obtained by an unlawful search and seizure was erroneously admitted in evidence and that the State prejudiced them by bringing into the courtroom in the jury's presence the 780 pounds of marihuana found in appellants' possession. The appellant Ramirez urges that the evidence was insufficient to support his conviction.

We will first consider the appellants' contention that the marihuana was obtained by an unlawful warrantless search and seizure made in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. At approximately 11:00 a.m., August 3, 1973,

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1. On original submission this case was dismissed in a per curiam opinion because the judgment in the record assessed an indefinite punishment. A supplemental transcript has now been filed which includes a nunc pro tunc judgment assessing a definite punishment. The per curiam opinion is withdrawn, and the appeals will be considered on the merits.

Department of Public Safety Narcotics Agent Hector Sanchez, while in his office in Corpus Christi, received a telephone call from an unidentified informer who had previously given information which had proved to be accurate and which had led to convictions. Agent Sanchez was told by the informer that he had overheard appellant Buitron say that later that afternoon he and Arturo Mireles would deliver a large quantity of marihuana from Robstown to the Goliad Inn in Goliad for a buyer from South Carolina. The marihuana was to be transported in a pickup truck with a camper shell. Mireles, appellant Buitron, and others were to be registered at the Goliad Inn in Mireles' middle name, De los Santos. Agent Sanchez knew Mireles by sight from former narcotics investigations and knew that both Mireles and the appellant Buitron had a reputation for being in the narcotics traffic.

Agent Sanchez with other officers traveled seventy miles from Corpus Christi to Goliad and commenced a surveillance of the Goliad Inn at approximately 12:30 p.m. At the Inn they saw only one pickup truck; it was red and white with a camper shell over the back deck, and the officers found it was registered in the name of a man residing in Robstown, the city from where the marihuana was to come.

At 2:00 p.m., Allen Tittle, Agent Sanchez's partner who had remained in Corpus Christi, received a call from the same informer who said: "Tell Hector (Sanchez) I think the load is on the way." Tittle transmitted this information to Sanchez by radio and then Tittle drove to Goliad. At 3:00 p.m., Sanchez saw Mireles arrive at the Goliad Inn in a white pickup truck. Mireles was accompanied by two other men, then unknown to the agents, but later identified as appellant Ramirez and Danny Joel Earley. The appellant Ramirez was driving; he parked the white pickup truck near the red and white pickup truck. The officers were unable to obtain the name of the registered owner of the white pickup during the time of the surveillance.

Mireles entered room No. 104, the room which was the nearest to the red and white pickup truck. He remained in the room a few minutes; then he returned to the white pickup truck and drove north toward Victoria. Shortly thereafter appellant Buitron also came from room No. 104 and also drove the red and white pickup truck north toward Victoria.

Both trucks stopped at a point beside the road approximately three miles north of Goliad. Agent Sanchez and other officers in radio communication with each other kept the pickup trucks under surveillance until they were stopped beside the road. Agent Sanchez and other officers saw Earley handing to Mireles a package approximately 6 inches by 12 inches in size and the appellant Ramirez taking a spare tire from the white pickup truck. That tire was later found in the back of the red and white pickup truck. Earley and the appellant Buitron got into the red and white pickup truck and drove north; Mireles and appellant Ramirez got into the white pickup and drove south back toward the Goliad Inn.

Agent Sanchez, who was conducting the surveillance in plain clothes, then called the Department of Public Safety dispatcher in Victoria by radio and asked that uniformed officers stop the red and white pickup truck and search it for narcotics. Sanchez gave the dispatcher a

specific description and the license number of the red and white pickup truck. While Agent Sanchez observed, the truck was stopped by Officer Havrda. Havrda testified there was a strong odor of marihuana around the truck as he approached it to arrest Earley and appellant Buitron. Havrda took the keys from the ignition switch and opened the camper lid. He found a large amount of marihuana shaped into bricks or "kilos," and he found some marihuana in duffel bags. Sanchez then approached the scene and inspected the driver's license of Earley and Buitron. Earley's driver's license had been issued in South Carolina. Agent Sanchez then called Agent Tittle on the radio, told him that the marihuana had been found, and ordered him to arrest Mireles and appellant Ramirez who had gone back toward the Goliad Inn in the white pickup truck.

Agent Tittle awaited the return of the white pickup truck at the Goliad Inn. At the motel office he found out that room No. 104 was registered in the name of De los Santos. He went to the room and was admitted by Mireles' wife, Adelfina. He placed the appellant Ramirez, Mireles, and Adelfina Mireles under arrest. In Adelfina Mireles' purse he found a pistol and approximately $14,000 wrapped in paper.

Goliad Chief Deputy Sheriff Wayne Mills testified that when Agent Sanchez first reached Goliad he, Mills, tried to find the only two magistrates who resided in the county. The Justice of the Peace was in the hospital in Victoria, and the County Judge was not available until he came to his offices between 5:00 and 5:30 p.m. The appellants had then been arrested.

We hold that the officers had probable cause to search the red and white pickup truck, and the evidence was properly admitted. Agent Sanchez was told by an informer who had previously proven reliable that he had overheard appellant Buitron discussing the sale and the details of the delivery of a large quantity of marihuana. The subsequent events observed by the officers during their surveillance corroborated the information received from the informer. Agent Sanchez knew Mireles on sight and saw him with a pickup truck at the precise place the informer had said. See Anderson v. State, 467 S.W.2d 434 (Tex. Cr. App. 1971); Rangel v. State, 444 S.W.2d 924 (Tex. Cr. App. 1969). The appellants and the others were observed exchanging trucks, a package, and a spare tire, which, although later determined not to contain narcotics, Agent Sanchez believed at the time contained cocaine or heroin. Everything observed was as the informer had said and was consistent with a sale of a large amount of marihuana. It was a reasonable deduction by the officers that the informer was also correct about the marihuana in the pickup truck. Almendarez v. State, 460 S.W.2d 921 (Tex. Cr. App. 1970). On the basis of the independent observations of the officers coupled with the information from the reliable informer, there was probable cause to search the red and white pickup truck and the appellant Buitron. Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959); Rivas v. State, 506 S.W.2d 233 (Tex. Cr. App. 1972); Kwant v. State, 472 S.W.2d 781 (Tex. Cr. App. 1971); Almendarez v. State, supra.

The appellant contends however that once the red and white pickup was stopped by the officers and the occupants secured, there should have been no search until

such time as a magistrate could be located and a search warrant obtained. An exception to the requirement for a search warrant is the search of an automobile under exigent circumstances. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed.2d 1879 (1949); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Here the pickup truck was under the complete control of the appellants until stopped by the officers. The probable cause to search was reinforced by observation of the exchange of the package wrapped in paper and the spare tire. The immediate search of the truck stopped on the highway was constitutionally permissible. Chambers v. Maroney, supra; Coyne v. State, 485 S.W.2d 917 (Tex. Cr. App. 1972). It would have been a greater intrusion, and unnecessary, to hold the occupants until either of the two magistrates in the county could be found. There was no error in the search as conducted. Chambers v. Maroney, supra; Harris v. State, 486 S.W.2d 88 (Tex. Cr. App. 1972); Coyne v. State, supra. Compare Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Stoddard v. State, 475 S.W.2d 744 (Tex. Cr. App. 1972).

The appellants rely on the case of United States v. Garay, 477 F.2d 1306 (5th Cir. 1973), to show that the officers should have held the truck until a search warrant was obtained. Without intimating that we think the decision in that case was correct, it may be distinguished. That case dealt with luggage on an airplane which when seized was not in possession of the defendants, and the courts there said that there were no exigent circumstances justifying a search when the luggage, although literally

mobile, was bound for only one destination, Detroit. If the search warrant was not timely obtained at the point of departure, it could easily have been used upon arrival. The luggage was capable of being within the officers' control at all times. Here the truck was leaving the county, driven by the participants in an evidently completed sale of marihuana, and was certainly not within the officers' control.

The ground of error is overruled.

The appellants next complain in the second ground of error that there was no evidence adduced at trial which showed appellant Ramirez's exercise of control or custody over the contraband. It was shown, as stated above, that appellant Ramirez was driving the white pickup truck when Earley, Mireles, and he first came to the Goliad Inn. He was among those who went to the spot beside the road where the package was given to Mireles by Earley, and where he (Ramirez) was seen taking the spare tire from the white pickup truck which tire was later found in the red and white pickup truck with the marihuana. Both Agent Sanchez and Officer Havrda testified that the marihuana smelled so as to be easily noticed outside the truck. Appellant Ramirez then proceeded back to the room at the Goliad Inn with Mireles, where he was arrested with Mr. and Mrs. Mireles and $14,000 in cash. The trial court charged on the law of principals and circumstantial evidence.

When exclusive control is not shown, there need be some independent facts linking the appellant to the contraband. E.g. Barnes v. State, 504 S.W.2d 450 (Tex. Cr. App. 1974). Mere presence of the appellant is not enough. E.g. Culmore v. State, 447 S.W.2d 915 (Tex.

Cr. App. 1969). However, surrounding facts and circumstances may be used to show that the appellant jointly possessed the contraband. E.g. Powell v. State, 502 S.W.2d 705 (Tex. Cr. App. 1973); Lewis v. State, 502 S.W.2d 699 (Tex. Cr. App. 1973). We find that such knowledge and possession by the appellant Ramirez was shown under these facts.

The ground of error is overruled.

In the third and final ground of error, the appellants maintain that the trial court erred in allowing all 780 pounds of marihuana to be placed in evidence and brought into the courtroom where the appellants offered to stipulate as to its weight and to the fact of it being marihuana. They claimed that the prejudicial effect outweighed the probative value of the evidence so as to make it inadmissible.

The State may agree or not to offers for stipulation of evidence as it sees fit. Rodriguez v. State, 373 S.W.2d 258 (Tex. Cr. App. 1963); Thompson v. State, 339 S.W. 2d 209 (Tex. Cr. App. 1960). Certainly the fact that the appellants offered to stipulate concerning the very contraband for which the appellants were being tried does not preclude the State from introducing such evidence. Bryers v. State, 480 S.W.2d 712 (Tex. Cr. App. 1972).

The ground of error is overruled.

The judgment is affirmed.

DALLY, Commissioner

(Delivered February 26, 1975)

Opinion approved by the Court

APPENDIX B

TRIAL COURT NO. 2856

THE STATE OF TEXAS

To The 24th Judicial District Court of Goliad County—

GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 19th day of March, A.D. 1975, the cause upon appeal to revise or reverse your judgment between Lionel

Horacio Buitron and Juan Guerra Ramirez, Appellants,

No. 49,098

vs.

The State of Texas, Appellee,

was determined, and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

Leave to file appellants' motion for rehearing denied.

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this

behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 21st day of March, A.D. 1975.

GLENN HAYNES
Clerk.

TOMMY LOWE
Deputy Clerk.